

No. 12927.

IN THE

**United States Court of Appeals
FOR THE NINTH CIRCUIT**

RKO RADIO PICTURES, INC., a corporation,

Appellant,

vs.

ANN SHERIDAN,

Appellee,

and

ANN SHERIDAN,

Appellant,

vs.

RKO RADIO PICTURES, INC., a corporation,

Appellee.

**BRIEF OF APPELLANT RKO RADIO
PICTURES, INC.**

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**BRIEF OF APPELLANT RKO RADIO
PICTURES, INC.**

Jurisdiction.

Jurisdiction of the court below is based on Section 1332, New Title 28 U. S. C. Plaintiff¹ is a citizen of California and defendant a citizen of Delaware, and the amount in controversy exceeds \$3,000 [R. 3]. Appeal to this court is from a judgment, entered upon the verdict of a jury, in favor of the plaintiff and against the defendant [R. 74-75] for the sum of \$55,162.42 and costs.

¹Plaintiff has also appealed from the judgment, and in order to avoid confusion, the parties are designated in this brief as in the complaint.

Statement of the Case.

Plaintiff is a motion picture actress and defendant is engaged in the production of motion pictures. On April 29, 1949, plaintiff and defendant entered into a written contract² wherein defendant employed plaintiff to render her services as an actress to portray the leading female role in a photoplay entitled "CARRIAGE ENTRANCE." Plaintiff sued to recover damages for breach of the contract of employment, claiming that the contract was terminated by defendant without justification.

The controversy between the parties arose from the provision of the contract that plaintiff should not be required to render any services pursuant thereto unless and until plaintiff had approved the actor who would portray the leading male role in the picture. Plaintiff on April 29, 1949, approved Robert Young to portray such role, but in her letter of approval agreed that defendant need not assign Young to the role but that any other individual proposed by the defendant should be subject to her approval as set forth in the employment agreement. This letter is set forth in full hereinafter. Young, at the time, was under a contract of employment which obligated him to perform his services in one picture for defendant, but gave him the right to approve or disapprove any story upon which the picture was to be based.

On July 11, 1949, the script for the photoplay "CARRIAGE ENTRANCE" was submitted to Young and he disapproved the story on which the picture was based and

²Pursuant to stipulation of the parties and the order of this court, the contract is omitted from the printed record but the portions thereof relevant to this appeal are printed in an appendix to this brief.

refused to perform the leading role. Thereafter defendant proposed to plaintiff a number of motion picture actors to portray the leading male role in the picture, but plaintiff refused to approve any of the actors so proposed, and on August 17, 1949, defendant terminated the employment contract. Defendant claims it proposed the names of actors of recognized standing and ability and endeavored, in good faith, to secure the approval of plaintiff of anyone of at least five different actors, and because of the refusal of plaintiff to approve any one of such actors for the leading male role, was justified in terminating the contract. Plaintiff, on the other hand, claimed that termination of the contract was wrongful and without cause, was taken in bad faith, and constituted a breach of contract.

The questions involved in the appeal of defendant all arise from the charge of the court to the jury or from the refusal of the court to give instructions tendered by the defendant. Exceptions to the instructions given and to the refusal to instruct as requested by defendant are set forth in full hereinafter. It is our contention that in its charge the court departed completely from the issues as made by the pleadings and to which practically all of the evidence in the case was addressed, erroneously instructed, or omitted to instruct, the jury as to the legal effect and proper interpretation of the contract, gave the jury inconsistent and misleading instructions and invaded the province of the jury by the instructions as to the facts.

Detailed references to the record are contained in the argument. Briefly, it is the position of defendant, that under the contract between the parties, the parties were not bound to perform thereunder unless and until plaintiff approved an actor proposed by defendant to play the leading male role, that it was the duty of defendant, after

Robert Young refused the role, to propose to plaintiff in good faith the names of qualified actors for the part, and the duty of the plaintiff to accept or reject such proposal or proposals in good faith; that if defendant, in good faith, proposed the name of a qualified actor, and if plaintiff, for any reason advanced in good faith refused to approve such actor, neither party was further bound under the contract, and defendant was justified in terminating the contract and incurred no liability to plaintiff upon so doing. The court not only refused to give instructions tendered by defendant in support of this theory of the case, but affirmatively instructed, that by her approval of Robert Young plaintiff became obligated to perform the contract, and if she rendered any services thereafter, the jury should bring in a verdict for the plaintiff.

Specifications of Errors Relied Upon.

Defendant assigns the giving of the following instructions to the jury as error:

1. "(COURT'S INSTRUCTION A).

"The plaintiff, Ann Sheridan, is a motion picture actress and the defendant, RKO Radio Pictures, Inc., is a corporation engaged in the production and distribution of motion pictures. According to the undisputed testimony defendant, RKO, took over from Polan Banks what was termed a 'package deal.' This included the story and script for 'CARRIAGE ENTRANCE,' the producer, Banks, the artist for the leading female role, Ann Sheridan, and the actor for the male leading role, Robert Young. RKO took over this package deal in settlement (687) of litigation between itself and Polan Banks. On April 29, 1949, the plaintiff and the defendant entered into the con-

tract which has been received in evidence as Exhibit No. 1, under which the plaintiff agreed to render her services as an actress in the leading female role in a motion picture to be produced by the defendant entitled 'CARRIAGE ENTRANCE' and defendant agreed to employ plaintiff as such actress. The plaintiff was not required to render any services pursuant to the contract unless and until she had approved:

- "(a) The final shooting script of the screen play for 'CARRIAGE ENTRANCE.'
- "(b) The director who would direct 'CARRIAGE ENTRANCE.'
- (c) The actor who would portray the leading male role in 'CARRIAGE ENTRANCE.'

"There is no dispute between the parties with respect to the approval by the plaintiff of the final shooting script of the screen play for 'CARRIAGE ENTRANCE' or the director who would direct the picture. This action presents the question as to whether plaintiff, prior to the termination of her employment by defendant, after approving Robert Young as an actor to portray the leading male role, rendered services to defendant RKO; questions as to the good faith of the respective parties in their dealings concerning the actor for said leading male role after Young's refusal of the part; and the questions presented by defendant's (688) Counter-claim." [R. 587-588.]

Such instruction was excepted to upon the following grounds:

- "(1) The court's instruction A, upon the ground that it states an erroneous legal proposition, and upon the ground that the contract of April 29, 1949, Plaintiff's Exhibit 1, provides that the artist, plaintiff, shall not be required to render any services pursuant to

the contract unless and until she has approved the actor who will portray the (669) leading male role in 'CARRIAGE ENTRANCE,' and that plaintiff never approved the actor who would portray said leading male role, in that the written approval of Robert Young was qualified by the condition that defendant need not assign him to portray the leading male role in the picture, and that any other individual proposed by defendant to portray the leading male role in the picture should be subject to the approval by plaintiff as provided in Article 1 of said agreement; that Robert Young refused to portray the leading male role in the picture and did not portray said role, or ever become the person who would portray said role; that instruction A assumes that Robert Young was approved as a person who would portray the said role and is contrary to the fact; that, in fact, plaintiff never approved any other actor who would portray the leading male role in the picture, and the instruction assumes a fact that is contrary to the evidence. And upon the ground that the plaintiff never became obligated to nor rendered services pursuant to the contract." [R. 570-71.]

2. "(COURT'S INSTRUCTION B).

"On the same day that the contract was entered into, April 29, 1949, plaintiff in writing, Exhibit No. 2, approved Robert Young to portray the leading male role in the picture. This writing was drawn by defendant and also provides that defendant need not assign Robert Young to the picture but that any other individual proposed by defendant to portray the role should be subject to the approval of plaintiff as set forth in the employment contract. Robert Young was, on April 29, 1949, required under a written contract with defendant to render his services in

one motion picture to be produced by defendant and based upon a story which should be approved by Robert Young. The defendant submitted the screen play for 'CARRIAGE ENTRANCE' to Robert Young about July 7th, 1949, and Young refused on July 11, 1949, to approve such screen play or to render his services in portraying the leading male role in the motion picture. Accordingly, you are instructed that after approval by plaintiff of Robert Young, and after plaintiff did obligate herself on April 29, 1949, to render her services in the picture, nevertheless, Young's refusal on July 11th, 1949, to perform the part, made it necessary for the parties to again agree on an actor for the leading male role, before production could start on the picture." [R. 588-589.]

Such instruction was excepted to upon the following grounds:

"(2) Court's instruction B, upon all of the grounds assigned for the objection to court's instruction A, and upon the ground that said instruction assumes that plaintiff did obligate herself to render services under the contract by her approval of Robert Young on April 29, 1949." [R. 571.]

3. "(COURT'S INSTRUCTION G).

"The case therefore breaks itself down into three parts:

"(1) Issues arising under paragraph 29 of the contract.

"(2) The general question of the good faith of plaintiff and defendant in their dealings, one with the other in connection with the approval of an actor for the leading male role, and

"(3) The issues presented by the counter-claim." [R. 591.]

Such instruction was excepted to upon the following grounds:

“(3) Court’s instruction G, upon the ground that the instruction fails to take into consideration that entirely (670) apart from paragraph 29 plaintiff never became obligated to render her services under the contract, because she never approved the actor who would portray the leading male role in ‘CARRIAGE ENTRANCE’ and said instruction does not present this essential part of the case.” [R. 572.]

4. “(COURT’S INSTRUCTION H-1).

“The court instructs you that Ann Sheridan, on April 29, 1949, approved Robert Young as the actor for the leading male role in the film play, pursuant to the contract, and that she thereby became bound to render her services to the defendant.

“Since there is no issue to be decided by you as to the approval of the script or the director by the plaintiff, Ann Sheridan, the sole issue which you must decide arising under paragraph 29 of the contract is as follows:

“(1) Did Ann Sheridan render any services to the (692) defendant RKO, pursuant to the contract and prior to its termination on August 17, 1949?

“If you answer this question in the affirmative, then your verdict must be for the plaintiff on her complaint in the sum of \$50,000 plus \$5,162.42 interest.” [R. 592.]

Such instruction was excepted to upon the following grounds:

“(4) Court’s instruction H-1, upon all of the grounds assigned for the objection to court’s instruction A, and upon the further ground that con-

trary to the fact the jury is thereby instructed that plaintiff on April 29, 1949, approved Robert Young as the actor for the leading male role, in the film play, and as the actor who would portray the leading male role in said film play, and that plaintiff by said approval of Robert Young became bound to render services pursuant to the contract. And upon the further ground that the court thereby instructed the jury that the sole issue to be decided by the jury was, Did the plaintiff render any services to defendant pursuant to the contract and prior to termination on August 17, 1949; and instructed the jury that if the answer to such question was in the affirmative the verdict of the jury must be for plaintiff. And upon the ground that the evidence shows that plaintiff rendered no services pursuant to the contract prior to the refusal of Robert Young to portray the leading male role in the picture, or at any time thereafter. And upon the further ground that the jury is thereby instructed that if plaintiff rendered (671) any services pursuant to the contract subsequent to April 29, 1949, and prior to August 17, 1949, plaintiff is entitled to recover without regard to whether plaintiff ever approved any actor who would portray the leading male role after Robert Young refused to perform said role, and that such instruction is erroneous under the law and contrary to the provisions of the contract." [R. 572-73.]

5. "(COURT'S INSTRUCTION J-1).

"If your answer to the foregoing question is in the affirmative and you arrive at a verdict for the plaintiff, then you need consider no further issues in this case.

"If your answer to the foregoing question is in the negative and you do not arrive at your verdict, then

you must consider the second phase of the case, namely, the question of the good faith of the parties in their dealings one with the other, in attempting to arrive at an agreement on an actor to play the leading male role in place of Robert Young." [R. 592-93.]

Such instruction was excepted to upon the following grounds:

"(5) Court's instruction J-1, upon all the grounds assigned for the objection to court's instruction A, and upon all of the grounds assigned for the objection to court's instruction H-1." [R. 573.]

6. "(COURT'S INSTRUCTION L).

"After Robert Young refused to play the leading male role, it became necessary for the plaintiff, Ann Sheridan, and the defendant, RKO, to agree on a new male lead before the production could continue.

"The procedure contemplated by the contract, Exhibit No. 1, and the letter, Exhibit No. 2, which defendant prepared for Miss Sheridan's signature, was as follows:

"That if Young was not used by the defendant in the film play, then RKO would propose an actor for the leading male role and Miss Sheridan could then approve or reject this actor. Under the agreement between the parties she had the right to approve or reject the proposed actor.

"In substance, this amounted to simply this: That Ann Sheridan and RKO, under the agreement, had to come to an agreement or a meeting of the minds on the actor for the leading male role.

"The plaintiff had no right or voice in the selection of an actor to portray the leading male role in

the picture. She could only approve or disapprove any actor selected by the defendant. The matter of selection of an actor for the role was exclusively the right of defendant and the defendant fully complied with its obligation under the contract if it proposed, in good faith, to assign to the role a competent (694) and qualified actor of recognized standing and reputation in the motion picture industry and one suited for the leading male role in the picture. It is not material that defendant did not actually assign any actor to portray the leading male if the plaintiff by her statements or conduct plainly indicated that she would not approve such actor if he were assigned to the role.” [R. 593-94.]

Such instruction was excepted to upon the following grounds:

“(6) Court’s instruction L, upon the ground that said instruction fails to state that if in good faith defendant proposed an actor to portray the leading male role in the picture, and the plaintiff failed to approve said actor after reasonable opportunity so to do, plaintiff never became obligated to render her services pursuant to the contract and could not recover in the action.” [R. 573.]

7. “(COURT’S INSTRUCTION P).

“If you find that Miss Sheridan in her dealings with RKO on this matter of filling the male lead was motivated by and acted in bad faith, then your verdict must be against Miss Sheridan on her complaint and must be a verdict that she take nothing by her complaint, unless you find that she is entitled to your verdict under my previous instructions.” [R. 595.]

Such instruction was excepted to upon the following grounds:

“(7) Court’s instruction P, upon all of the grounds assigned for the objection to court’s instruction A, and upon all of the grounds assigned for the objection to court’s instruction H-1.” [R. 573.]

8. “(COURT’S INSTRUCTION Q).

“If you find that both parties in their dealings concerning the filling of the leading male role, were motivated by and were acting in good faith in such dealings, then your verdict must be against Miss Sheridan on her complaint and must provide that she take nothing by that complaint unless she is entitled to recover under my previous instructions.

“When I talk about ‘my previous instructions’ I am talking about the instructions concerning section 29 of the contract.” [R. 595-96.]

Such instruction was excepted to upon the following grounds:

“(8) Court’s instruction Q, upon all of the grounds assigned for the objection to court’s instruction A, and court’s instruction H-1 (672).” [R. 573.]

Defendant also assigns as error the refusal of the court to give the following instructions requested by defendant:

9. “Instruction No. 1. Requested by Defendant, RKO Radio Pictures, Inc.

“The plaintiff, Ann Sheridan, is a motion picture actress, and the defendant, RKO Radio Pictures, Inc., is a corporation engaged in the production and distribution of motion pictures. On April 29, 1949, the

plaintiff and defendant entered into the contract which has been received in evidence under which the plaintiff agreed to render her services as an actress in the leading female role in a motion picture to be produced by the defendant entitled 'Carriage Entrance' and defendant agreed to employ plaintiff as such actress. The plaintiff was not required to render any services pursuant to the contract unless and until she had approved

"(a) The final shooting script of the screen play for 'Carriage Entrance.'

"(b) The director who would direct 'Carriage Entrance.'

"(c) The actor who would portray the leading male role in 'Carriage Entrance.'

"There is no dispute between the parties with respect to the approval by the plaintiff of the final shooting script of the screen play for 'Carriage Entrance' or the director who would direct the picture. This action arises from the failure of plaintiff, prior to the termination of her employment by defendant, to approve an actor to portray the leading male role." [R. 57-58.]

Defendant excepted to the refusal of the court to give said instruction on the following ground:

"Defendant's proposed instruction No. 1, upon the ground that the court failed to instruct the jury that the plaintiff prior to the termination of her employment failed to approve an actor to portray the leading male role in the picture, but on the contrary instructed the jury that the plaintiff had approved Robert Young for such role and thereby became obligated to render her services pursuant to the contract, and that such an instruction embodies an er-

roneous conclusion of law and an erroneous interpretation and construction of the terms of the agreement between the parties." [R. 574.]

10. "Instruction No. 2. Requested by Defendant, RKO Radio Pictures, Inc.

"On the same day that the contract was entered into, plaintiff in writing approved Robert Young to portray the leading male role in the picture. This writing provides that defendant need not assign Robert Young to the picture but that any other individual proposed by defendant to portray the role should be subject to the approval of plaintiff as set forth in the employment contract. Robert Young was, on April 29, 1949, required under a written contract with defendant to render his services in one motion picture to be produced by defendant and based upon a story which should be approved by Robert Young. The defendant submitted the screen play for 'Carriage Entrance' to Robert Young and Young refused to approve such screen play or to render his services in portraying the leading male role in the motion picture. Accordingly, you are instructed that the approval by plaintiff of Robert Young did not obligate her to render her services in the picture and made it necessary that defendant should propose to plaintiff some other person to play such role, and that plaintiff should approve such person before she became bound to render her services." [R. 58-59.]

Defendant excepted to the refusal of the court to give said instruction on the following ground:

"10. Defendant's requested instruction 2, on the ground that under the terms of the contract the ap-

proval by plaintiff of Robert Young on April 29th was not and did not obligate plaintiff to render her services under the contract.” [R. 574.]

11. “Instruction No. 5. Requested by Defendant, RKO Radio Pictures, Inc.

“The contract between the plaintiff and the defendant provides that if because the plaintiff does not approve an actor to portray the leading male role in the picture the plaintiff does not become obligated to and does not render any services pursuant to the contract, the defendant shall not be required to pay any compensation to the plaintiff. Therefore, if the defendant did, in good faith, propose any actor to portray such role and plaintiff did not approve such action, defendant was entitled to terminate the contract of employment without paying any compensation to plaintiff.” [R. 61.]

Defendant excepted to the refusal of the court to give said instruction on the following ground:

“(11) Defendant’s instruction 5, upon the ground that said instruction is a correct statement of the law, material to the consideration of the issues of fact, and is not covered by any instruction given by the court.” [R. 574.]

12. “Instruction No. 6. Requested by Defendant, RKO Radio Pictures, Inc.

“The contract between the plaintiff and the defendant provides that if the plaintiff does not approve

an actor to portray the leading male role in the picture, the plaintiff does not become obligated to render any services pursuant to the contract. Therefore, if the defendant did in good faith propose any actor to portray such role and plaintiff did not approve such actor, the plaintiff never became obligated to render any services pursuant to the contract.” [R. 62.]

Defendant excepted to the refusal of the court to give said instruction on the same ground as it excepted to the refusal of the court to give instruction No. 5.

13. “Instruction No. 7. Requested by Defendant, RKO Radio Pictures, Inc.

“If you find that the defendant did in good faith propose any actor to portray the leading male role in the picture and plaintiff did not approve such actor, the plaintiff never became obligated to render any services pursuant to the contract. Therefore, any services she might have performed could not have been pursuant to the contract and the plaintiff is not entitled to be compensated for them.” [R. 62.]

Defendant excepted to the refusal of the court to give said instruction on the same ground as it excepted to the refusal of the court to give instruction No. 5 [R. 575].

14. “Instruction No. 8. Requested by Defendant, RKO Radio Pictures, Inc.

“Defendant was under no obligation to propose more than one actor for the leading male role in the

picture if such actor was, in the honest judgment of the defendant, qualified for the performance of such role. Having proposed such an actor, defendant was entitled to insist that plaintiff either approve or disapprove such selection by defendant, and if plaintiff disapproved such proposal, defendant might have terminated the contract of employment of plaintiff without incurring any liability to plaintiff." [R. 63.]

Defendant excepted to the refusal of the court to give said instruction on the same ground as it excepted to the refusal of the court to give instruction No. 5 [R. 575].

Summary of Argument.

Under the express terms of the contract plaintiff did not become obligated to render services unless and until she approved the actor who would portray the leading male role in the picture, and unless and until she first gave such approval did not become entitled to recover any compensation. The contract required good faith in the proposal by defendant of individuals for the role and in the exercise by plaintiff of the right of approval of the individuals proposed. If, after a good faith endeavor, the parties were unable to reach agreement, neither party was bound to perform and plaintiff could not recover.

The approval by plaintiff of Robert Young for the leading role expressly recognized the right of defendant not to appoint him, and reserved to plaintiff the right

of approval of any other person who might be proposed by defendant in his place. When Young refused to perform his services in the picture, other persons were proposed by defendant and approval thereof refused by plaintiff. The only issue for the jury to determine was whether defendant had acted in good faith in proposing these individuals and was justified in terminating the contract because of plaintiff's refusal to approve any of the persons proposed.

The court instructed the jury erroneously that the approval of Young for the leading male role by the letter of April 29, 1949, obligated plaintiff to perform services pursuant to the contract and left no question for the jury except whether plaintiff performed any services. In contradictory and inconsistent instruction, however, the court told the jury that after Young refused the role it was necessary for the parties to agree on an actor for the leading role before production could start on the picture. The court refused to give any instructions tendered by defendant setting forth its theory of the defense—namely, first, that because plaintiff never approved the actor who would portray the leading role she never became obligated to render any services and that in such event plaintiff was entitled to no compensation; and second, that defendant had diligently and in good faith sought the approval of actors capable and qualified for the role, and because of the refusal of plaintiff to approve any of said persons, was justified in terminating the contract.

ARGUMENT.

I.

The Terms of the Contract Made Approval by the Plaintiff of the Actor for the Leading Male Role a Condition Precedent to Any Obligation on the Part of Plaintiff to Perform or Any Liability on the Part of Defendant to Compensate Plaintiff.

In an appendix to this brief there is set forth the provisions of the contract which are material to a consideration of this appeal. The plaintiff in the contract is designed as "Artist" and defendant as "Producer."

Paragraph 1 specifies:

"Artist shall not, however, be required to render any services pursuant hereto unless and until she has approved each and all of the following:

- (a) The final shooting script of the screenplay for CARRIAGE ENTRANCE;
- (b) The director who will direct CARRIAGE ENTRANCE; and
- (c) The actor who will portray the leading male role in CARRIAGE ENTRANCE."

Paragraph 4 provides that the plaintiff's employment shall start on such date as is specified by the defendant in writing not earlier than June 1, 1949, and not later than July 6, 1949, and shall continue after the starting date until the plaintiff has completed all of her services in connection with the principal photography of "CARRIAGE ENTRANCE."

Paragraph 6 provides that "On condition that Artist fully performs all of her obligations hereunder, and as payment in full for Artist's services during the first

fifteen weeks of the term hereof . . . the producer agrees to pay" \$150,000.00, \$100,000.00 of which shall be deferred and payable only from the gross receipts of the picture, and \$50,000.00 of which shall be paid on the first regular weekly payday after principal photography of "CARRIAGE ENTRANCE" is commenced.

The right of termination is given the defendant by paragraph 21 in the event that the plaintiff should fail, refuse or neglect to perform any of her obligations under the contract.

Paragraph 29 reads as follows:

"Producer shall not be required to use Artist's services hereunder or to complete the production of CARRIAGE ENTRANCE, and shall be deemed to have fully performed all its obligations to Artists by paying Artist the minimum compensation payable to Artist hereunder. However, if, because Artist does not approve any one or more of the items specified in paragraph 1, Artist does not become obligated to, and does not, render any services pursuant hereto, Producer shall not be required to pay any compensation whatever to Artist hereunder."

At the time of the execution of the contract the plaintiff signed and delivered to the defendant the following letter:

"Gentlemen:

"Please refer to the agreement between us dated April 29, 1949, relating to my employment by you in connection with your motion picture now entitled 'Carriage Entrance,' which agreement is being entered into concurrently herewith.

“This will confirm that I have approved and hereby approve any of the following individuals to act as the director of ‘Carriage Entrance’:

“John Cromwell,
“Robert Stevenson,
“H. C. Potter.

“You shall not be obligated to assign any of these individuals to direct the Picture, but any other individuals proposed by you to direct the Picture shall be subject to my approval, as set forth in Article 1 of said employment agreement.

“This will also confirm that I have approved and hereby approve Robert Young to portray the leading male role in ‘Carriage Entrance.’ You shall not be obligated to assign him to portray the leading male role in the Picture, but any other individual proposed by you to portray the leading made role in the Picture shall be subject to my approval, as set forth in Article 1 of said employment agreement.

“Dated April 29, 1949.

“Yours very truly,
“Ann Sheridan.”

[Pltf. Ex. 2; R. 90-91.]

Young was obligated to perform his services as a motion picture actor in one picture for the defendant, but the contract gave Young the right to refuse to appear in any story of which he did not approve [Deft. Ex. C; R. 477]. On July 7, 1949, the defendant submitted to Young a screen play based upon the novel “CARRIAGE ENTRANCE” advising Young that the screen play was being submitted to him for his approval as provided in his contract [R. 473]. On July 11, 1949, Young acknowledged receipt of the screen play and notified the defendant that he

was rejecting and disapproving the submitted story [R. 475]. Commencing immediately after the rejection of the role by Young, the parties endeavored to arrive at a substitute for the leading male role in the picture.

Plaintiff visited the studio on June 16 for the first time after the contract was signed on April 29, and this for the purpose of attending a luncheon for her on that date [R. 91]. Sometime between July 5 and July 7 she again went to the studio for a conference about the script, a copy of which had been received and read by plaintiff prior to that date [R. 91-92]. At this conference³ she was told that Young had refused the part [R. 93] and discussions started as to a possible replacement for Young [R. 94]. Sometime after the 11th of July plaintiff again went to the studio and was shown some film in which Mel Ferrer and Robert Ryan appeared for the purpose of persuading her that such actors or either of them was suitable for the part [R. 96-97]. There were further discussions on a date between the 11th of July and July 14 [R. 99], between the 14th and 16th of the month [R. 100], and on dates which the plaintiff fixed as on or about July 20, July 22 and July 25. All of these consultations or conferences were held after it was known that Young would not play the role and for the purpose of arriving at an agreement on some actor that defendant was willing to propose for the role and plaintiff was willing to approve.

The defendant had employed the dress designer chosen by plaintiff, and prior to July 27 plaintiff had checked with him on designs for costumes she was to wear in

³Since Young did not refuse the part until July 11, it is apparent that the witness is mistaken as to the date of this meeting.

the picture, and on July 27 she went to the studio for costume fittings [R. 121] which defendant at large expense was having designed and made to be worn by plaintiff in the picture. Plaintiff was in the hospital for a check and rest for about one week and returned to the studio for the next conference on August 11 [R. 123]. At that time Rogell, the executive producer for defendant proposed to plaintiff the names of Mel Ferrer, Robert Ryan, Robert Preston, Richard Basehart and Van Heflin, and plaintiff refused to approve any of such persons [R. 123-124]. On August 15 Rogell arranged a meeting between Howard Hughes, who was the official of defendant having the final authority in the selection of the stars for the picture, and plaintiff and Hughes again tried to persuade plaintiff to approve one of the actors proposed by defendant but without success. Plaintiff did agree to look at more film of Robert Preston, Mel Ferrer, Robert Ryan and Van Heflin [R. 125-128] the next day, August 16, and saw different pictures in which Ryan, Ferrer, Preston and Heflin had appeared, but she still refused her approval [R. 128-129].

All the above references to the record are to the testimony of plaintiff, but the greater part of the record relates to the discussions and consultations between the parties relative to the selection of an actor for the leading male role in the picture. It is not necessary to discuss this evidence in detail, but we think it may be fairly summarized by stating that the parties were practically in continuous consultation respecting the selection of a leading male actor from the time it became known, July 11, that Young would not play the role, until the contract was terminated by the defendant on August 17, 1949. In the course of these conferences and discussions the de-

fendant proposed for the role persons named above, all of whom we think it must be conceded were motion picture actors of recognized standing and ability, although according to the opinion of plaintiff not suitable for the lead in this particular picture. Irrespective of the differing views of the parties respecting the suitability of these actors, the continuous and protracted efforts of defendant to secure the approval of plaintiff indicates very convincingly a good faith attempt to reach an agreement on this matter and get the picture into production with the plaintiff as the female star.

The plaintiff, on her part, made suggestions to the defendant of individuals whom she would approve for the role, but none of these were satisfactory to the defendant and no person to portray the leading male role in the picture proposed by the defendant was ever approved by the plaintiff. On August 17, 1949, the defendant, feeling that it had made every reasonable effort to secure the approval of the plaintiff to an actor for the role, terminated the contract. Subsequently a picture based upon the story was produced with a person other than the plaintiff in the leading female role.

It should be pointed out, in connection with these consultations and conferences, as the court in fact instructed the jury:

“The plaintiff had no right or voice in the selection of an actor to portray the leading male role in the picture. She could only approve or disapprove any actor selected by the defendant. The matter of selection of an actor for the role was exclusively the right of defendant and the defendant fully complied with its obligation under the contract if it proposed, in good faith, to assign to the role a competent and qualified actor of recognized standing and reputation

in the motion picture industry and one suited for the leading male role in the picture. It is not material that defendant did not actually assign any actor to portray the leading male if the plaintiff by her statements or conduct plainly indicated that she would not approve such actor if he were assigned to the role." [R. 594.]

Likewise that:

"It is not important how or in what manner names of actors for this role were proposed or what formality was used. RKO would not need to make a formal proposal in writing or otherwise, as to the name of an actor which Miss Sheridan had orally rejected. The law does not require the doing of an idle act."

These instructions were, of course, completely ineffective because the other instructions took the matter covered by these instructions completely out of the hands of the jury.

The provision of the contract that plaintiff should not be obligated to render any services unless and until she had approved an actor to portray the leading male role, and paragraph 29 stating that defendant should not be required to pay plaintiff any compensation in the event she did not so approve, established a condition upon the performance of which depended the right of plaintiff to recover any compensation. It is elementary that where a right is made to depend on the occurrence of a future event and, through no fault of the promisor the event does not occur, there can be no recovery on the promise.

Van Orden v. Metson, 75 Cal. App. 2d 595;
Cantwell v. Gage, 111 Cal. App. 209;
Lynch v. Keystone Consol. Mng. Co., 163 Cal. 690.

II.

The Obligation of Each of the Parties Was the Exercise of Good Faith in Reaching Agreement on the Selection of an Actor for the Leading Male Role.

While the bare language of the contract made the failure of the defendant to approve the leading actor a complete excuse for nonpayment of any compensation to plaintiff, defendant has always recognized that in this, as in every contract, there is an implied covenant of good faith.

Universal Sales Corp. v. Calif. Press Mfg. Co.,
20 Cal. 2d 751;

Nelson v. Isaac Abrahams, 29 Cal. 2d 745.

The clause of the contract relieving plaintiff of any obligation to render services unless and until she approved an actor for the leading male role is, on its face, one for her benefit and protection. Had plaintiff agreed to perform her services with any actor that defendant might select, there could never have been any controversy between the parties and this litigation would not have resulted. The controversy arose entirely from the insistence of plaintiff that she should have the final say as to any actor defendant proposed for the role—a right which plaintiff demanded despite the fact that it would seem reasonably certain that since defendant was investing more than a million dollars in the picture, it would select no actor who was not clearly competent and qualified. Defendant could hope to recoup this large

expenditure—to say nothing of making any profit as to which it had a 90% interest as against the 10% interest of the plaintiff—only if the “stars” of the picture had sufficient standing and public appeal to induce attendance at the theatre.

The requirement of good faith was mutual. Defendant's duty was to propose an actor of standing and ability, recognized as such in the profession and suitable for the role to be portrayed. Plaintiff was required to approve or reject such proposals on the basis of an honest estimate of the actors proposed. If both so proceeded, the failure to reach agreement subjected neither to any liability. If either failed to so proceed, the implied covenant was breached and a right of action arose.

In this connection, as we have already observed, the selection of an actor was the right and duty of the defendant. Plaintiff could only approve or disapprove. Plaintiff had no right to select or propose an actor but only to pass judgment on those selected or proposed by defendant.

III.

The Court Should Have Instructed the Jury That the Issues to Be Determined by It Was Whether Good Faith Had Been Exercised by the Respective Parties in Attempting to Reach an Agreement on the Actor for the Leading Male Role in the Picture and Whether the Defendant Was Justified in Terminating the Contract as and When It Did.

The issues made by the pleadings revolved around the acts and offers of the parties with respect to the selection of an actor for the leading role in the picture. Thus the complaint alleges the proposal of certain available actors by plaintiff [R. 6]; the refusal of defendant to appoint any of such persons [R. 7-8]; the willingness to and actual cooperation of plaintiff in selecting an actor [R. 8]; and the termination of the contract by defendant arbitrarily without cause and in bad faith [R. 8-9]. The defense is specifically pleaded in paragraphs IV and V [R. 26-27] of the further and additional defense of the answer. These allegations, in brief, are that after Young refused to portray the role, defendant in an honest and good faith endeavor to secure the approval of plaintiff to a leading actor in order to complete the production of the picture and utilize the services of plaintiff, proposed qualified, talented, experienced and capable actors, and that plaintiff unreasonably and without justification refused to approve any person so proposed, and because of such refusal defendant terminated the contract. The court, we submit, should in appropriate language have instructed the jury that it would determine whether defendant had acted in good faith in proposing to plaintiff the names of actors, and if so whether because of the continued and repeated refusal of plaintiff to approve any of such actors defendant was justified in terminating the contract as and when it did.

The record discloses that practically all of the evidence offered by the parties was responsive to these issues made by the pleadings. A reading of the record will disclose that plaintiff addressed her evidence to the proposition that she had cooperated fully with the defendant in an endeavor to agree upon a suitable actor; that she had made suggestions in this respect to the defendant all of which were rejected by defendant; that the actors proposed by defendant were not proper or qualified for the part; and that the contract was terminated by defendant without the actual assignment of any actor to the role and was not justified. Defendant, on the other hand, attempted to satisfy the jury that it had proposed not one but five actors, all eminently qualified, of recognized standing and ability in the industry; that plaintiff had unequivocally refused to approve any one of such actors; that it would have been idle to assign one of such persons to the role because of such refusal; that it had done everything that could have reasonably been required of it in a good faith endeavor to agree on a leading actor; and that it was justified in assuming that further effort to secure the consent of plaintiff would have been futile and in terminating the contract as and when it did.

The evidence on these issues was conflicting and defendant does not assert that a verdict against it, if these issues had been properly submitted, would have been without support in the evidence. But because the court never properly submitted the real issues to the jury, defendant contends it could not, and did not, secure any determination by the jury of the real issues in the case. The construction which the court placed upon the contract and legal effect which this court accorded the letter of April 29, 1949, were erroneous and made impossible any proper consideration by the jury of the defense which defendant pleaded and offered evidence to sustain.

IV.

The Charge of the Court Was Erroneous Both Because of the Instructions Given and the Refusal to Instruct as Requested by the Defendant.

The court refused to give any instruction proposed by plaintiff except Plaintiff's Instruction 10 [R. 598] as modified by the court [R. 578]. The court likewise refused to give any instruction requested by defendant except Instruction 4 [R. 60] which the court gave as part of its Instruction L [R. 593]. All of the remaining portions of the charge were prepared by the court.

(A) *The Court Was in Error in the Instructions Which It Gave.*

The instructions to which defendant objected, and the objections urged thereto are, in compliance with the rules of this court, set out in full in the assignment of errors. We now proceed to point out the particulars in which we believe the instructions were erroneous.

COURT'S INSTRUCTION (A).

[R. 587.]

This instruction the court, after stating generally the situation, concludes as follows:

"This action presents the question as to whether plaintiff, prior to the termination of her employment by defendant, after approving Robert Young as an actor to portray the leading male role, rendered services to defendant RKO; questions as to the good faith of the respective parties in their dealings concerning the actor for said leading male role after Young's refusal of the part; and the questions presented by defendant's Counter-Claim." [R. 588.]

This instruction is misleading for the reason that it contains the plain implication that the approval by plaintiff of Robert Young was absolute and that thereby she became bound to render services pursuant to the contract. The court should have advised the jury that under the terms of the contract and the letter of April 29, 1949, RKO was not obligated to assign Young for the role, and that any other person who was assigned must be approved by the plaintiff before she was bound to perform her services. It was and is the position of the defendant that the court should at all times have made plain to the jury that the approval of Robert Young on April 29, 1949, was only conditional and did not and would not obligate her to perform any services except that Young agreed to perform the role. The court should have told the jury that the plaintiff never became bound to render services pursuant to the contract, because of the refusal of Young and the failure of plaintiff to approve an actor for the role, and the jury was to determine whether this situation resulted from the fault of plaintiff or of the defendant.

COURT'S INSTRUCTION (B).
[R. 588.]

This instruction sets forth generally the contents of the letter of April 29, 1949 [Pltf. Ex. 2, R. 90], and the fact that Young was not required to render his services in the picture and that on July 11, 1949, Young refused to render such services, and then concludes:

"Accordingly, you are instructed that after approval by plaintiff of Robert Young, and after plaintiff did obligate herself on April 29, 1949, to render

her services in the picture, nevertheless, Young's refusal on July 11th, 1949, to perform the part, made it necessary for the parties to again agree on an actor for the leading male role, before production could start on the picture." [R. 589.]

Here the jury is told plainly that by the letter of April 29, 1949, the plaintiff obligated herself to render her services in the picture and this, we submit, is not the legal effect of the qualified approval given by plaintiff in the said letter. The instruction is inconsistent within itself, because while the jury is told that plaintiff's approval obligated her to render her services in the picture, the court proceeds to advise the jury that after Young's refusal to perform the part it was necessary for the parties to again agree on an actor for the leading male role "before production could start on the picture." If production could start on the picture only after plaintiff had agreed on an actor for the leading male role, certainly plaintiff was not bound to render services until this agreement was reached. Otherwise a situation would be presented where the plaintiff was bound to render services, but such services could never be rendered because production could not start on the picture. The court should have told the jury that after Young refused to perform it was necessary that the defendant should propose and the plaintiff should approve some actor before the plaintiff was obligated to render any services under the contract.

The court, in this instruction, uses the phrase "before production could start on the picture", but in truth and in fact the selection of the leading male actor in the manner provided in the contract was essential to the existence of any obligation on the part of plaintiff to render her services, or defendant to compensate her. In other words,

if it was admitted that defendant had selected a competent, qualified actor for the role, exercising good faith in such selection, and had assigned such actor to the role and the plaintiff, honestly feeling that the actor selected was not adequate or suitable for the part, refused her approval, neither party would have been under any liability nor would have had any right or remedy as against the other.

COURT'S INSTRUCTION (G).
[R. 591.]

This instruction reads as follows:

"The case therefore breaks itself down into three parts:

"(1) Issues arising under paragraph 29 of the contract.

"(2) The general question of the good faith of plaintiff and defendant in their dealings, one with the other in connection with the approval of an actor for the leading male role, and

"(3) The issues presented by the counter-claim."

The objection to this instruction is that it fails to take into consideration, that entirely apart from paragraph 29 of the contract, plaintiff under paragraph 1 of the contract and the letter of April 29, never became obligated to render her services under the contract because she never approved the actor who would portray the leading male role in the picture, and the instruction does not present this essential part of the case. Paragraph 29 of the contract is merely complimentary to paragraph 1, the latter providing that plaintiff shall not be bound to render her

services until she approves the actor who will portray the leading male role, and paragraph 29 releasing the defendant from the obligation to pay plaintiff any compensation until she has approved such actor.

COURT'S INSTRUCTION H-1.

[R. 592.]

"The court instructs you that Ann Sheridan, on April 29, 1949, approved Robert Young as the actor for the leading male role in the film play, pursuant to the contract, and that she thereby became bound to render her services to the defendant.

"Since there is no issue to be decided by you as to the approval of the script or the director by the plaintiff, Ann Sheridan, the sole issue which you must decide arising under paragraph 29 of the contract is as follows:

"(1) Did Ann Sheridan render any services to the defendant RKO, pursuant to the contract and prior to its termination on August 17, 1949?

"If you answer this question in the affirmative, then your verdict must be for the plaintiff on her complaint in the sum of \$50,000 plus \$5,162.42 interest."

The jury is here expressly told that when the plaintiff approved Young by the letter of April 29, 1949, she became bound to render her services to the defendant, and that the sole issue which remained for consideration by the jury was whether plaintiff had rendered any services to the defendant pursuant to the contract and if so, the jury must return a verdict for the plaintiff.

This is a formula instruction. Concerning such instructions the courts have said that an instruction which

includes a formula may be justified only if it contains all of the elements essential to a recovery.

Mazzota v. L. A. Ry., 25 Cal. 2d 165;

LaRue v. Powell, 5 Cal. App. 2d 439;

Keller v. Pac. Tel. & Tel. Co., 2 Cal. App. 2d 513;

Sinan v. A. T. & S. F. Ry. Co., 103 Cal. App. 703.

The omission of any one of the essential elements may not be compensated for or cured by the fact that other instructions state the omitted factors required to sustain the verdict directed.

Mazzota v. L. A. Ry. (supra);

La Rue v. Powell (supra).

The rule is that:

“Where an instruction directs a verdict for plaintiff, if the jury finds certain facts to be true, it must embrace all of the things necessary to show the legal liability of the defendant and to warrant the direction or conclusion that plaintiff is entitled to a verdict.”

Starr v. L. A. Ry. Co., 187 Cal. 270, p. 278.

“It is clear that an instruction directing a verdict for plaintiff in the event that the jury finds certain facts to be true must embrace all the things necessary to show the legal liability of the defendant and to warrant the direction or conclusion contained therein, that plaintiff is entitled to a verdict, and such is the rule in this state.”

Pierce v. United Gas and Electric Co., 161 Cal. 176, 184.

“Formula instructions should not be given. As said in *Tice v. Pacific Elec. Ry. Co.*, 36 C. A. (2d) 66, 71, formula instructions ‘are not calculated best to

serve most successfully the administration of justice. Their final disappearance will improve the conduct of court trials.' While the giving of formula instructions is not in itself prejudicial error, the giving of them here, added to the other circumstances of the case, combined to deny the plaintiff a fair trial."

Taha v. Finegold, 81 Cal. App. 2d 536, 543.

"The province of the jury is invaded where an instruction assumes the existence of a fact which is not in evidence or with respect to which there is a conflict of evidence, and any error in this respect is not, it has been held, cured by other charges which submit to the jury the question whether such fact exists. The rule is not violated, however, by an instruction which merely states the claim of a party, but does not intimate that such claim has been proved, or which opens with the formula 'if you find' certain facts to be true."

24 Cal. Jur. 841, sec. 101;

Ryan v. L. A. I. & C. S. Co., 112 Cal. 244, 254;

Vinther v. Sunset Mutual, etc. Co., 11 Cal. App. 2d 118, 123;

Clark v. Volpa Bros., 51 Cal. App. 2d 173, 179.

"It has frequently been held that instructions of this kind must correctly set forth all the conditions necessary, that the exclusion of any one necessary element constitutes reversible error, and that even a correct instruction in another part of the charge of a matter omitted from the formula instruction, does not rectify the error. (*Beyerle v. Clift*, 59 Cal. App. 7, 9; *Pierce v. United Gas and Electric Co.*, 161 Cal. 176, 184; *Douglas v. Southern Pacific*, 203 Cal. 390, 393.)"

Spear v. Leuenberger, 44 Cal. App. 2d 236, 249.

The court's instruction H-1 plainly violated these rules of law.

The evidence was uncontradicted that both parties to the contract assumed that a replacement for Young would present no great difficulty. Everything that plaintiff did was in contemplation of an agreement between the parties on a leading man, and all of her acts in this respect are detailed in her testimony. She went to a welcome luncheon at the studio on June 16 [R. 91]; she received and read a copy of the script and made some notes on it prior to her visit to the studio in early July and discussed the script at that time with the writer and the author of the book [R. 92-93]: She discussed a possible replacement for Young on this visit and on the subsequent visits about July 11 [R. 96], July 14 [R. 99], July 16 [R. 100], July 20 [R. 114], July 22 [R. 117], and July 25 [R. 118]. On July 27 she went in for costume fittings and prior thereto she stopped at the office of the costume designer and O.K.'d his sketches [R. 121-122]. On some of these occasions she looked at pictures in which the actors under discussion appeared. She made two trips to the studio, one on August 11 [R. 123], and one on August 16 [R. 128] and one to the office of Mr. Hughes on August 15 [R. 125]. On August 11 and August 16, she again looked at pictures and film. Except with respect to reading and discussing the script and approving and fitting costumes, it could hardly be said these things constituted services rendered pursuant to the contract. They were rather steps taken in an effort to reach an agreement that would make it possible to commence to render services pursuant to the contract.

If these activities on the part of the plaintiff constituted a performance of services pursuant to the contract, then

the instruction left nothing for determination by the jury, for these activities of the plaintiff were not only not denied but were testified to by witnesses for the defendant. The court might equally well have directed a verdict for the plaintiff. Whether services of the nature indicated were services "rendered pursuant to the contract," the court nowhere told the jury. Defendant's view is that such services were not rendered within the meaning of the phrase "pursuant to the contract" and could not be so rendered unless and until plaintiff became legally obligated to render services under the contract.

We do not see how there can be any room for doubt that the plaintiff never became obligated to render her services pursuant to the contract of April 29, 1949.

The contract, paragraph 1, recites that plaintiff shall not, however, be required to render any services pursuant hereto *unless and until* she has approved each and all of the following:

- (a) The final shooting script of the screenplay for CARRIAGE ENTRANCE;
- (b) The director who will direct CARRIAGE ENTRANCE; and
- (c) The actor who will portray the leading male role in CARRIAGE ENTRANCE.

The letter of April 29, 1949, states that plaintiff

"has approved and does hereby approve Robert Young to portray the leading male role in 'CARRIAGE ENTRANCE.' You shall not be required to assign him to portray the leading male role in the picture, but any other individual proposed by you to portray the

leading male role in the Picture shall be subject to my approval as set forth in Article 1 of said employment agreement."

The contract, paragraph 29, says:

"However, if because Artist does not approve any one or more of the items specified in paragraph 1, Artist does not become obligated to and does not render any services pursuant hereto, Producer shall not be required to pay any compensation whatever to Artist hereunder."

These contractual provisions taken in connection with the undisputed fact that plaintiff never approved any actor to portray the role, leave no room for argument that plaintiff became obligated to render her services to defendant.

As has been pointed out above, the pleadings and the evidence are addressed to the issues as to who was at fault in the failure to agree on an actor to portray the leading male role and as to whether the defendant was justified in terminating the agreement without actually assigning to the role any of the actors proposed to plaintiff without giving plaintiff previous notice of its intended termination of the contract. The court by its instruction H-1 took these issues away from the jury and told the jury, contrary, we contend, to these express contractual provisions, that by the approval of Young by plaintiff on April 29, 1949, she thereby became bound to render her services to defendant, and that the sole issue to be decided by the jury was:

"Did Ann Sheridan render any services to the defendant RKO pursuant to the contract and prior to its termination on August 17, 1949?"

This is a completely false issue. The contract was not terminated because of failure of plaintiff to render services. Plaintiff was not required to render any services unless and until she approved the actor who was assigned by defendant to portray the leading male role, and certainly until that occurred neither party could acquire any rights or incur any obligations pursuant to the contract. The picture could not be produced without an actor for the leading male role. Such actor could be selected by defendant only with the approval of plaintiff. It seems an absurdity to assert that plaintiff became bound to render her services to defendant by her approval of Young when such approval expressly left open and necessary an agreement on the actor to play the leading role.

"It cannot with reason be contended that instructions such as these, so obviously erroneous, and yet so tersely put as to be easily comprehensible to the jury, were not prejudicial, or that the verdict of the jury, in a close case like this, would not be injuriously affected thereby."

Stein v. Lacassie, 189 Cal. 118, 123.

The instruction was manifestly erroneous in that it directed a verdict for plaintiff if any services were rendered by plaintiff, and completely excluded from consideration by the jury the fact and legal effect of Young's refusal to portray the role, the efforts which were made by the parties to agree upon a substitute, the question of the presence or absence of good faith of each party in those negotiations, and the question of whether defendant was justified in terminating the contract when it did. These matters were the very heart of the case, and the giving of this formula instruction excluded the possibility of the jury giving any consideration to these matters.

COURT'S INSTRUCTION J-1.
[R. 592.]

This instruction embodies in part the only issue presented by the pleadings—namely, the question of the good faith of the parties in attempting to arrive at an agreement on an actor to play the leading male role. We say "in part" because in addition to the question of good faith in attempting to secure an agreement on this matter, the other matter in issue which should have been included in the instruction was the question of whether because of the negotiations with respect to a substitute for Young, the defendant was justified in concluding such negotiations and terminating the contract. By this instruction the jury is told that if its answer to the issues presented by instruction H-1 is in the affirmative, it should not consider further issues in the case, and this makes it clear that the remaining portion of the instruction may as well not have been given. Where it cannot be determined upon what theory the verdict was returned, the instruction must be held to be prejudicial.

Stein v. L. A. Ry. Co., 187 Cal. 270, 280.

COURT'S INSTRUCTION L.
[R. 593.]

This instruction seems to us to embody the real issues between the parties. It is manifest, however, that the jury, having determined that the plaintiff had rendered services, as it must be assumed that it did, was in no way guided or controlled by this instruction. It is not disputed that defendant did not actually assign any actor to play the leading role, but it is equally certain from the evidence that it proposed the names of at least five actors and made it clear to plaintiff that it would assign any one

of such actors to the role if the plaintiff would approve such actor, and the jury should have been permitted to pass on the question as to whether or not the acts and conduct of the plaintiff were such as to plainly indicate that actual assignment would have been an idle act. The instruction is also erroneous because it fails to instruct the jury that if in good faith the defendant proposed an actor to portray the leading male role in the picture and plaintiff failed to approve said actor after reasonable opportunity so to do, plaintiff never became obligated to render her services pursuant to the contract and could not recover in the action.

COURT'S INSTRUCTION P.
[R. 595.]

"If you find that Miss Sheridan in her dealings with RKO on this matter of filling the male lead was motivated by and acted in bad faith, then your verdict must be against Miss Sheridan on her complaint and must be a verdict that she take nothing by her complaint, unless you find that she is entitled to your verdict under my previous instructions."

In this instruction the court told the jury that even though the plaintiff acted in bad faith in the matter of filling the male lead, it could not render a verdict against the plaintiff if it found that the plaintiff had rendered any services prior to the termination of the contract. In other words, the court in effect here says that even though the plaintiff negotiated with the defendant in bad faith and without any expectation or intent of arriving at an agreement on a player for the leading male role, still she was entitled to recover on the basis of its finding that she had rendered services pursuant to the contract prior to

its termination. This is equivalent to a declaration that having once rendered any services, and although it was manifestly impossible for the picture to be produced without an agreement as to the leading male role, still plaintiff was under no necessity of making a good faith endeavor to reach an agreement on the actor to portray the leading male role, and that all of the negotiations and conferences to this end were completely useless.

COURT'S INSTRUCTION Q.
[R. 595.]

"If you find that both parties in their dealings concerning the filling of the leading male role, were motivated by and were acting in good faith in such dealings, then your verdict must be against Miss Sheridan on her complaint and must provide that she take nothing by that complaint unless she is entitled to recover under my previous instructions.

"When I talk about 'my previous instructions' I am talking about the instructions concerning section 29 of the contract."

This instruction is subject to the objections indicated to Instruction P above. It tells the jury that even though both parties acted in good faith in attempting to arrive at an agreement on the leading role, this would be immaterial if the plaintiff were entitled to recover under instruction H-1. The result is that even though the parties recognize that the picture could not be produced unless a leading actor was agreed upon, if both went forward in a good faith endeavor to agree upon such actor but were unable to reach an agreement, plaintiff could still recover under instruction H-1. The sum total effect of these instructions P and Q was to make it plain to the jury that noth-

ing that was done or omitted by the parties had any effect on the right of the plaintiff to recover if she had rendered any service pursuant to the contract and prior to its termination. The instruction also refers only to section 29 of the contract when it should have included the provision of section 1 of the contract providing that plaintiff was not required to render any services unless and until she approved an actor for the leading male role. Both the pleadings and the evidence are addressed to the theory that the rights of the parties were to be determined by the acts and negotiations of the parties respecting the substitute for Young, and that these rights and obligations were to be fixed by both of the provisions of the contract above referred to. This instruction as well as instruction H-1 and P, completely departed from the theory upon which the case was tried.

(B) *The Court Erred in Refusing to Give Instructions Requested by Defendant.*

The court refused to instruct the jury as requested by defendant in its instructions Nos. 1, 2, 5, 6, 7 and 8. These instructions embody defendant's theory of its defense and were not covered by other instructions given.

It is the duty of the court to give instructions expounding the law upon every reasonable theory of the case finding support in the evidence.

Bickford v. Pacific Elec. Co., 120 Cal. App. 542;

Ferrula v. Santa Fe Bus Lines, 83 Cal. App. 2d 416;

Rutherford v. Standard Eng. Co., 88 Cal. App. 2d 554.

A litigant requesting it is entitled to proper instructions presenting his theory of the case based upon the pleadings and proof, and if the parties to an action rely upon different theories, instructions should be given when requested as to each.

Bickford v. Pacific Elec. Ry. Co. (supra).

“While it is a well established rule that one may not complain of instructions given to a jury at his request (citing cases) and that a party requesting instructions upon a legal question which are given in another form is in no position to complain of other instructions upon that subject (citing cases) nevertheless the case is different where a requested instruction contains certain elements not covered by the instructions given.

“‘Where a trial court throws aside instructions asked by one or both of the parties and prepares written instructions of its own, these must fairly instruct the jury on all legal questions involved in the case, and it must appear that no injury has been done to the defeated party by refusal of the instructions asked by him.’ *Wacaser v. People*, 134 Ill. 438.”

Dowd v. Atlas Taxicab Co., 69 Cal. App. 9, 14.

Defendant's proposed Instruction No. 1 [R. 57] told the jury that the action arose from the failure of the plaintiff prior to the termination of her employment by the defendant to approve an actor to portray the leading male role. This instruction was justified by the fact that the only approval by the plaintiff expressly recognized the fact that defendant was not obligated to assign the actor approved to the role, and that if it did no do so plaintiff could not be required to render

her services under the contract until some actor proposed by the defendant was approved by the plaintiff. If plaintiff had approved such actor, then both of the parties would have been obligated to perform and the action would not have arisen. The court, however, took the position and expressly stated to the jury that the approval of Young bound the plaintiff to render her services to the defendant, and the only issue was as to whether she had rendered any such services.

As pointed out in *Defendant's proposed Instruction No. 2* [R. 58], the writing under which the plaintiff approved Robert Young expressly provided that defendant need not assign him to the picture but that any other individual proposed by the defendant had to be approved by the plaintiff before she was required to render her services. The refusal of the court to give this instruction is based upon the position which the court took in its instructions to the jury that despite the language of the contract and of the letter of April 29, 1949, the plaintiff nevertheless by the approval of Young became obligated to render her services to the defendant. This, we must emphatically assert, is contrary to the clear language of the contract and is the basis upon which defendant excepted to the refusal of the court to so instruct the jury.

Defendant's proposed Instructions Nos. 5 [R. 61], 6 [R. 62], 7 [R. 62] and 8 [R. 63] are based upon what the defendant contends are proper interpretations of the agreement between the parties, and because of the refusal of the court to give these instructions the jury was never properly and clearly instructed as to the legal meaning of the contract and of the letter of April 29, 1949.

Conclusion.

The rights and obligations of the parties to this action depend upon the proper construction of the agreement which was entered into between them. The agreement plainly said that the plaintiff could not be required to render any services to the defendant unless and until she had approved the actor who would portray the leading male role. In writing the plaintiff approved Robert Young for that role and by such writing agreed that defendant need not assign him to the role and that any other person assigned must be approved by her before she was bound to render any services pursuant to the contract. This right of approval by the plaintiff was for her benefit. Certainly the defendant had nothing to gain by providing that she should have such right of approval, and it must be assumed that she insisted that such approval should be conditional to her obligation to render services.

Young refused the role, as he was entitled to do under his contract, and after such refusal the parties engaged in an effort to find some individual whom the defendant was willing to propose and the plaintiff would approve. The plaintiff had nothing to do with the selection of any person to portray this role. It was the exclusive right and duty of the defendant to make the selection. The plaintiff could only approve or refuse to approve. If the defendant, in good faith, proposed to assign to the role an actor competent and qualified for the part and the plaintiff refused to approve such individual, and both parties acted in good faith, neither ever became obligated to perform under the contract and termination of the contract by the defendant upon such inability to agree was a right

which the contract gave to the defendant. If the defendant had actually assigned to the role an actor of recognized standing and ability qualified to portray the role, and the plaintiff in good faith had refused to approve such actor, each had done everything which the contract had required and neither could have been held to have breached the contract. If the plaintiff, by her actions and conduct or statements, indicated that she would not approve any of the persons proposed to be assigned to the role by defendant, actual assignment would have been an idle act and was not required.

The pleadings distinctly put in issue the question of whether, after Young refused the role, the defendant had breached the contracts by the failure to exercise good faith in the proposal of actors to fill the role, or had terminated the contract without affording plaintiff a sufficient and reasonable opportunity to approve one of the actors so proposed. The evidence of both parties was for the most part addressed to these issues. There was no dispute concerning the fact that plaintiff had, prior to the refusal of Young, read and discussed the script or that, after Young's refusal, there were numerous conferences concerning a substitute for Young, or that plaintiff had appeared for costume fittings. If these acts of the plaintiff—and no contention is made that plaintiff did anything else in performance of the contract—together with the conditional approval of Young by the letter of April 29, 1949, entitled the plaintiff to a verdict, then the trial was a waste of the time of the parties, the court and the jury.

The instructions of the court took from the jury the real issues of the case, completely departed from the

theory of the parties as to the matters in issue, erroneously determined the legal effect of the contract and the letter of April 29, and submitted the case to the jury on a completely false issue.

Appellant respectfully submits that the judgment should be reversed so that defendant may have what it is legally entitled to, and what it was denied by the court's instructions, namely, a determination by the jury of whether it had fulfilled the requirement of good faith in attempting to secure the approval of plaintiff of any actor to portray the leading male role in the picture, and because of the refusal of plaintiff to approve any one of the actors proposed, was justified in terminating the contract.

Respectfully submitted,

MITCHELL, SILBERBERG & KNUPP, and
GUY KNUPP,

By GUY KNUPP,

Attorneys for Appellant.

APPENDIX.

This Agreement, made and entered into at Los Angeles, California, this 29th day of April, 1949, by and between RKO Radio Pictures, Inc., a Delaware corporation, hereinafter called "Producer," and Ann Sheridan, hereinafter called "Artist,"

WITNESSETH:

1. Producer hereby employs Artist as an actress, performer and entertainer to portray the leading female role in the photoplay now entitled "**CARRIAGE ENTRANCE**" to be produced by Producer. Said photoplay may hereinafter be referred to as "**CARRIAGE ENTRANCE**" or as the "Picture," or as the "photoplay." Artist shall not, however, be required to render any services pursuant hereto unless and until she has approved each and all of the following:

- (a) The final shooting script of the screenplay for **CARRIAGE ENTRANCE**;
- (b) The director who will direct **CARRIAGE ENTRANCE**; and
- (c) The actor who will portray the leading male role in **CARRIAGE ENTRANCE**.

With respect to item (a) above, the Artist has heretofore approved the first draft estimating script entitled "**CARRIAGE ENTRANCE**," by Leopold Atlas, consisting of a one (1) page note, one hundred forty-eight (148) pages of screenplay and five (5) pages of synopsis covering the unfinished ending, all of which material is hereinafter referred to as the "Estimating Script," subject to such Estimating Script being completed and "polished." The

Artist agrees that she shall not have the right to disapprove of the final shooting script if it is a reasonable completion and development of the Estimating Script or does not depart from the novel CARRIAGE ENTRANCE and the Estimating Script so as to substantially alter and diminish the importance of the Artist's role as written in the novel CARRIAGE ENTRANCE and in the Estimating Script.

* * * * *

3. Artist hereby accepts the employment described in paragraph 1, and agrees to give her entire time and attention and to devote her best talents, efforts and abilities, exclusively to Producer during the term of Artist's employment hereunder, except as is provided in paragraph 5.

4. The term of Artist's employment hereunder shall start on such date as Producer may hereafter specify to Artist in writing, which date, however, shall not be earlier than June 1, 1949, nor later than July 6, 1949. Such starting date, however, shall be subject to the completion by Artist of her services in connection with the principal photography of the photoplay originally entitled "I WAS A MALE WAR BRIDE." If Artist has not completed such services before the starting date specified by Producer pursuant hereto, such starting date shall automatically be postponed until the day following the completion of such services by Artist.

Said term shall continue after the starting date thereof until Artist has completed all of her services in connection with the principal photography of CARRIAGE ENTRANCE.

* * * * *

6. On condition that Artist fully performs all of her obligations hereunder and as payment in full for Artist's services during the first fifteen (15) weeks of the term hereof (exclusive of periods of suspension) or such lesser period as may constitute the term hereof, and for all rights granted and/or agreed to be granted by Artist hereunder, Producer agrees to pay, or cause to be paid to, Artist the sum of One Hundred Fifty Thousand Dollars (\$150,000.00) (One Hundred Thousand Dollars (\$100,000.00) of which shall be deferred and payable only from the gross receipts of the Picture, as herein-after provided), said One Hundred Fifty Thousand Dollars (\$150,000.00) being hereinafter called "the flat compensation," plus a sum (herein called the "percentage compensation") equal to ten percent (10%) of the net profits derived by Producer and its successors and assigns, from the distribution of CARRIAGE ENTRANCE, accruing during the period of ten (10) years from and after the first general release of CARRIAGE ENTRANCE in the United States. Artist's compensation shall be payable as follows:

- (a) Fifty Thousand Dollars (\$50,000.00) on account of the flat compensation on the first regular weekly payday after the principal photography of CARRIAGE ENTRANCE has commenced, but in no event later than the seventh day after such photography has commenced;
- (b) The balance of the flat compensation, to wit: One Hundred Thousand Dollars (\$100,000.00)

thereof, shall be deferred and shall be paid to Artist only from the gross receipts of CARRIAGE ENTRANCE accruing during the period of ten (10) years from and after the first general release of CARRIAGE ENTRANCE in the United States, and otherwise at the time and in the manner herein-after set forth;

(c) The percentage compensation, and that portion of the flat compensation which is deferred, as aforesaid, shall, except as hereinafter provided, be computed and determined in accordance with the provisions of Articles 15A, 15B, 15C and 15D of the employment agreement dated April 29, 1949 between Producer and Polan Banks, a true copy of which is attached hereto, marked Exhibit "A" and by this reference made a part hereof. Whenever necessary, references to the "Producer" in said Exhibit "A" shall be deemed, for the purposes of this agreement, to be references to the Artist, and wherever necessary, references to the "Corporation" in said Exhibit "A" shall be deemed, for the purposes of this agreement, to be references to Producer. The statement in said Exhibit "A" to the effect that the Producer shall not be entitled to any share of the net profits of the Picture shall not, of course, apply under this agreement.

Producer warrants, so far as Artist is concerned, that the amounts payable under item (1) of subdivision (c) of Article 15D of said Exhibit "A" will not exceed Sixty Thousand Dollars (\$60,000.00).

(d) That portion of the flat compensation which is deferred as aforesaid, shall be paid at the times and in the manner set forth in this subdivision (d), rather than at the times and in the manner set forth in Exhibit "A."

Said deferred flat compensation shall not be paid or payable to the Artist earlier than as follows:

Payable not earlier than:

The first \$20,000 thereof	January 1, 1950
The next \$20,000 thereof	January 1, 1951
The next \$20,000 thereof	January 1, 1952
The next \$20,000 thereof	January 1, 1953
The next \$20,000 thereof	January 1, 1954

That portion of the first Twenty Thousand Dollars (\$20,000.00) of said deferred flat compensation which accrues from the gross receipts of the Picture prior to or during the calendar year 1950 shall be paid to the Artist in installments of Five Hundred Dollars (\$500.00) per week, commencing on Producer's first regular payday during the calendar year 1950, and continuing throughout said calendar year, but only if and to the extent that said first Twenty Thousand Dollars (\$20,000.00) is or becomes payable from the gross receipts of the Picture; provided, however, that if said entire first Twenty Thousand Dollars (\$20,000.00) is or becomes payable during said calendar year, Producer may omit twelve (12) of said weekly payments to be made during said calendar year. As to any part of said first Twenty Thousand Dollars (\$20,000.00) which does not accrue

from the gross receipts of the Picture during said calendar year, the same shall be payable to the Artist at the times and in the manner set forth in Exhibit "A."

With respect to the second, third, fourth and fifth Twenty Thousand Dollars (\$20,000.00) of said deferred flat compensation, the same procedure shall be followed with respect to the calendar years 1951, 1952, 1953 and 1954 respectively.

Producer has heretofore delivered to Artist a copy of the Production-Distribution Agreement referred to in Exhibit "A," and Producer warrants that the same is a true copy thereof. The Producer agrees to deliver all statements of gross receipts to the Artist, and to make its books and records available to the Artist, and to make deposits to the account of the Artist, all at the times and in the manner provided for for the benefit of the "Producer" in Articles 3, 4, 5 and 6 of Section VII of the Production-Distribution Agreement referred to in Article 15A of said Exhibit "A."

Anything herein contained to the contrary notwithstanding, the compensation hereinbefore specified shall constitute payment in full for Artist's services only if the term of Artist's employment hereunder does not exceed fifteen (15) consecutive weeks. If said term, exclusive of any periods of suspension permitted hereunder, shall continue beyond fifteen (15) consecutive weeks, Producer agrees to pay Artist in addition to such compensation salary for the time said term continues beyond fifteen (15) weeks at the rate of Ten Thousand Dollars (\$10,000.00) per week. Artist shall be paid on a pro rata basis for

any incomplete week at the end of such additional time, and, for the purpose of such prorating, one day's salary shall be One Thousand Six Hundred Sixty-six Dollars and Sixty-six Cents (\$1,666.66). Salary for such additional time shall be paid to the Artist each week during the time said term continues beyond fifteen (15) weeks as aforesaid.

Artist shall not have any right, title or interest in or to CARRIAGE ENTRANCE, and Artist's interest in the net profits thereof shall not constitute a lien thereon or an assignment of the proceeds therefrom. Producer shall have the right to pledge, mortgage, assign, or otherwise hypothecate CARRIAGE ENTRANCE or the proceeds therefrom, either in whole or in part, without obtaining Artist's consent; provided, however, that no such pledge, mortgage, assignment or other hypothecation shall in any manner limit or impair any of Artist's rights hereunder. Artist acknowledges that Producer has not made, and does not now make, any representation with respect to the gross receipts or net profits to be derived or received from CARRIAGE ENTRANCE. Producer shall have full charge and control of the manner in which, and the terms upon which, CARRIAGE ENTRANCE shall be distributed, sold, exhibited and/or exploited, as well as all matters and things pertaining thereto.

7. Producer shall deliver to Artist as soon as the same are available, and not later than one (1) week prior to the starting date of the term hereof, a copy of the final budget for CARRIAGE ENTRANCE and a list of all defer-

ments payable out of the receipts from CARRIAGE ENTRANCE, which list shall show the name of all parties entitled to deferment, the amount each is entitled to, and the order and manner in which such deferments are to be paid.

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12. If the term of Artist's employment hereunder shall begin later than the earliest date permitted therefor pursuant to paragraph 4, Artist agrees to report to Producer's studio or elsewhere when and as directed by Producer during the period (not exceeding, however, one week) prior to the starting date of said term, and to appear, assist and take part in tests, wardrobe fittings, conferences, publicity interviews, rehearsals, still photographs and the like in connection with CARRIAGE ENTRANCE, but Artists shall not in any event be required so to report during the period of thirty (30) days following Artist's return to Los Angeles. Artist shall not be entitled to any compensation for services rendered pursuant to this paragraph in addition to that specified in paragraph 6.

13. Artist shall render all services required under this agreement in accordance with the instructions of Producers, and pursuant to such rules and regulations as Producer may establish for the regulation of its business. Artist agrees that at all times from the date hereof until the expiration of the term hereof Artist will keep Producer advised of where Artist can be located without unreasonable delay, and that at all times during her term of employment hereunder Artist will be available and subject

to Producer's call, and will appear at Producer's studio, or at such other place as Producer may designate, ready, willing and able to perform Artist's services hereunder promptly upon notice from Producer. Any such notice may be given to Artist either orally, or in writing, personally, by telephone, mail, telegraph or any other medium of communication.

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21. If Artist is incapacitated or prevented from performing any or all of Artist's obligations hereunder by reason of sickness, disfigurement, impairment of voice, or by reason of any other disability, or if Artist's appearance or physical makeup shall be altered or changed to such an extent that Artist shall not have Artist's present unique and unusual value as an actress, performer or entertainer, or if Artist shall fail, refuse or neglect to perform any of Artist's obligations hereunder, or if Artist shall indicate, either personally or through Artist's representative, that Artist will at a future time fail, refuse or neglect to perform any of Artist's obligations hereunder, Producer may, at its election, suspend this agreement during any part of such incapacity, prevention, alteration, change, failure, refusal, neglect or indication of a future failure, refusal or neglect, and thereafter as hereinafter in this paragraph provided. Any such suspension due to any indication of a future failure, refusal or neglect may be continued from the time of such indication until Artist shall personally report to Producer, in the manner herein-after provided, and thereafter, as hereinafter in this

paragraph provided. No such suspension shall prejudice Producer's right to terminate this agreement at any time for any of the reasons herein specified, and shall be deemed cumulative and not exclusive of any other remedy to which Producer may be entitled at law or in equity. Producer may terminate this agreement if Artist should at any time fail, refuse or neglect to perform any of Artist's obligations pursuant hereto, or if Artist should indicate, either personally or through Artist's representative that Artist will at a future time fail, refuse or neglect to observe or perform any of Artist's obligations hereunder, or if Artist shall in any other manner breach this agreement, or if any incapacity, prevention, alteration or change as hereinbefore referred to shall continue for an aggregate of five (5) days or more. Producer shall not be liable to Artist for any compensation hereunder after this agreement shall have been so terminated, except as is set forth in paragraph 22 hereof. If Producer terminates this agreement pursuant to this paragraph 21 during the first five weeks of the term hereof (exclusive of any periods of suspension permitted hereunder), Artist shall refund to Producer such pro rata portion of the Fifty Thousand Dollars (\$50,000.00) compensation theretofore received by Artist pursuant to (a) of paragraph 6 as is represented by that portion of such first five (5) weeks as occurs after such termination. For the purpose of such prorating, one week's compensation shall be taken to be Ten Thousand Dollars (\$10,000.00), and any part of an incomplete week shall be calculated on the basis of

One Thousand Six Hundred Sixty-six Dollars and Sixty-six Cents (\$1,666.66) per day. If Artist shall, in good faith, while any suspension shall continue (and provided this agreement shall not in the meantime have been terminated by Producer) personally report to Producer ready, willing and able to resume the performance of Artist's obligations to Producer's satisfaction, Producer may nevertheless continue such suspension for a period of time (but not exceeding eight (8) weeks) necessary to make preparation for the actual utilization of Artist's services; provided, however, no such further suspension shall prejudice Producer's right to terminate this agreement at any time for any of the reasons herein specified, and shall be deemed cumulative and not exclusive of any other remedy to which Producer may be entitled at law or in equity.

22. Artist shall not be entitled to any compensation for any time during which this agreement is suspended. If this agreement is terminated pursuant to paragraph 20 or paragraph 21 and CARRIAGE ENTRANCE is thereafter released for general distribution with Artist appearing therein, Artist's flat compensation shall be prorated for the time the term of her employment hereunder continued (exclusive of periods of suspension) prior to such termination at the rate of Ten Thousand Dollars (\$10,000.00) per week, and for the purpose of prorating any portion of an unfinished week one day's compensation shall be One Thousand Six Hundred Sixty-six Dollars and Sixty-six Cents (\$1,666.66). Any compensation theretofore received hereunder by Artist shall be credited

against any such payment. Any flat compensation to which Artist may be so become entitled in excess of Fifty Thousand Dollars (\$50,000.00) shall be deferred and paid to Artist as set forth in (b) of paragraph 6. In the contingency provided for in this paragraph 22, Artist's right to receive the percentage compensation provided for in paragraph 6 shall not be affected.

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29. Producer shall not be required to use Artist's services hereunder or to complete the production of CARRIAGE ENTRANCE, and shall be deemed to have fully performed all its obligations to Artist by paying Artist the minimum compensation payable to Artist hereunder. However, if, because Artist does not approve any one or more of the items specified in paragraph 1, Artist does not become obligated to, and does not, render any services pursuant hereto, Producer shall not be required to pay any compensation whatever to Artist hereunder.